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No. 08-669

Supreme Court, U.S.
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In The
Supreme Court of the United States

JACK SUNSERI AND CONSOLIDATED PARTNERS LTD.,
Petitioners,

v.

PHYLLIS PROCTOR, CONRAD PROCTOR
AND DAVID PROCTOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are judgment creditors of a partnership. After entry of a judgment against the partnership, Petitioners filed a separate action against Respondents, alleging that one or more of them were partners in the partnership and seeking to collect on the judgment. The District Court held that Petitioners' claims against Respondents accrued when Petitioners' claims against the partnership accrued, not when Petitioners obtained a judgment against the partnership. As a result, Petitioners' claims were barred by the statute of limitations. The Sixth Circuit affirmed and adopted the District Court's Opinion.

The questions presented are:

1. Are there compelling reasons to grant the Petition, where Petitioners have not satisfied the criteria set forth in Supreme Court Rule 10?

2. Is the Sixth Circuit's holding that the Petitioners' claim against Respondents accrued when their claims against the partnership accrued and not when Petitioners obtained a judgment against the partnership, consistent with the holdings of this Court and other jurisdictions, and consistent with the policy interests behind statutes of limitations?

3. Does the Sixth Circuit's holding deprive Petitioners' judgment of the effect it would have had in the judgment rendering state?

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INTRODUCTION

Petitioners filed suit against a partnership in New York State court in 1996. They obtained a judgment against the partnership in April 2005. The partnership was uncollectible. In May 2005, Petitioners sued the Respondents in Michigan, alleging that one or more of them were partners in the partnership and that they were jointly and severally liable for the judgment. Respondents removed the case to Federal Court. In response to Respondents' Motion for Summary Judgment, the District Court ruled that Petitioners' claims were barred by various statutes of limitations, because Petitioners' claims against Respondents had accrued when Petitioners' claims against the partnership accrued, not when Petitioners' obtained a judgment against the partnership. The Sixth Circuit Court of Appeals affirmed and adopted the reasoning in the District Court's Opinion.

This Court should deny Petitioners' petition for review. First, the petition does not present any compelling reasons justifying review. Second, the Sixth Circuit's decision does not conflict with any decisions of this Court or of another circuit (and in fact follows a decision of the Ninth Circuit). Third, the Sixth Circuit's decision furthers the policy interests behind statutes of limitations.

COUNTER-STATEMENT OF THE CASE

I. Factual Background.

Macro Cellular Partners ("Macro") was a California general partnership formed in 1988 in order to

participate in cellular phone lotteries offered by the Federal Communications Commission. (Record 45, p.515). Participants in these FCC lotteries sought licenses for cellular airspace in rural markets throughout the country. After winning a license for an area in Ohio in 1989, Macro entered into an Agreement in May 1991 to sell the license to another company, Cellular Communications, Inc. ("CCI"). Pursuant to that Agreement, CCI agreed to pay Macro several installments of cash and stock totaling approximately $20 million. (Record 59, p.1130).

A. The New York Litigation against Macro.

In August 1996, Jack Sunseri and Consolidated Partners, Ltd. ("Sunseris" or "Petitioners") commenced an action styled *Jack A. Sunseri and Consolidated Partners Ltd. v. Macro Cellular Partners and Cellular Communications, Inc.*, in the Supreme Court of New York (the trial court). Sunseris asserted several causes of action: injunctive relief, negligence, breach of contract, conversion, breach of fiduciary duties, and conspiracy (the "New York Litigation"). (Record 59, p.1050). All of the claims in the Amended Verified Complaint were predicated on Sunseris' contention that Macro had wrongfully withheld or intentionally converted Sunseris' share of the CCI stock received by Macro. Sunseris alleged that their share had a value exceeding $1.8 million. Sunseris also alleged that their share was Macro's "sole remaining asset." (*Id.*, p.1056). Sunseris sought $5.4 million in punitive damages, which they knew or should have known would exceed Macro's ability to pay. (*Id.*, p.1058).

In May 1998, the New York Supreme Court granted Sunseris' Motion for Summary Judgment on their

claim that Macro had breached the partnership agreement by, "withholding from Plaintiffs their rightful share of partnership distributions." (Record 59, p.1077-078). Having decided the issue of liability, the court set the matter of damages for trial.

Approximately $1.4 million, which was being held in escrow by the court and which represented the market value of the CCI stock withheld from Sunseris,[1] was released to them in 1998. (Record 59, p.1085-086). Thus, at that time, Sunseris knew they had received substantially all of Macro's "sole remaining asset."

B. Sunseris' Move for Leave to Amend Their New York Complaint in 1999.

In January 1999, after the New York Litigation had been pending for about two and a half years, newspaper reports began circulating regarding Vodaphone Group's intention to purchase Airtouch to create the world's largest wireless telephone firm. In fall of 1999, Sunseris moved to amend their New York complaint to allege that if Macro had properly

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[1] By way of further background, in or about July 1996, an announcement was made that CCI would be merging with a company called Airtouch Communications. Pursuant to a Notice of Redemption issued by CCI/Airtouch, holders of CCI preferred stock (including the Sunseri share held by Macro) could elect to convert their stock into publicly traded CCI common stock, or have their preferred stock redeemed for cash. Although Macro had asked that the Sunseri share be converted into CCI common stock, the New York court found that there were certain infirmities in the request, and as a result, CCI redeemed the stock for $1.4 million rather than converting them to common stock. CCI subsequently deposited those funds with the court.

effectuated the conversion of their CCI preferred stock into CCI common stock in August 1996, Sunseris would have benefited from the Airtouch/Vodaphone merger three years later. Sunseris sought to increase the amount of their compensatory damages from $1,800,000 to $4,100,000. Sunseris also sought to name the individual Macro partners and to add an additional cause of action alleging that the partners were individually and jointly and severally liable for the acts Macro alleged in the Complaint, because Sunseris feared that Macro was or was about to become insolvent. (Record 59, p.1086).

The New York Court denied that portion of Sunseris' Motion for Leave to Amend that sought to add alleged general partners of Macro as parties and to hold them liable for Macro's conduct. The court granted Plaintiffs' request to increase the amount of their alleged damages, which the court considered to be merely a request to increase the proposed complaint's *ad damnum* clause. (*Id.*, p.1092.)

In denying Sunseris' motion to join the Micro partners individually to the suit, the trial judge stated as follows:

> Having elected to pursue this action only against Micro for nearly four years, plaintiffs may not materially alter the established nature and course of the litigation at this late date by expanding the action to include Micro's partners. **Plaintiffs are of course free to pursue any claims which they may have**

> **against the individual partners in separate actions.**

(*Id.*, p.1094, emphasis added.)

Although the New York Court's Order was signed on May 11, 2000, it apparently was not filed until November 17, 2000. See *Id.* Sunseris filed their Second Amended Complaint on December 15, 2000. (Record 59, p.1100). In their Second Amended Complaint, Sunseris once again alleged that Macro was insolvent. (*Id.*, p.1105-107).

C. The New York Trial against Macro.

The New York Court conducted a bench trial in February 2004. The issues for trial were limited to: the "amount of damages attributable to [Macro's] breach of the partnership agreement;" "whether Macro breached its fiduciary duty owed to the plaintiffs by withholding their partnership interest and if so the amount of damages caused by the breach;" and "whether Macro is liable to plaintiffs on the conversion claim." (Record 59, p.1127).

In February 2005, the New York court issued its Post-Trial Decision. On the breach of contract claim, the court awarded Sunseris $186,666, representing Sunseris' "rightful share of partnership distributions." (*Id.*, p.1158).[2]

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[2] This award was in addition to the $1.4 million, less legal fees, that Sunseris had already received. *Supra*.

On the breach of fiduciary duty claim, the court ruled that Macro had breached its fiduciary duty by failing to properly respond on Sunseris' behalf to the notice of redemption issued by CCI and by wrongfully converting the Sunseri share. In computing the resulting compensatory damages, the trial court found that if Sunseris' share of CCI preferred stock had been converted to CCI common stock in August 1996, Sunseris would have held the stock for an additional three years and would have benefited from the merger in 1999 between Airtouch and the Vodaphone Group. (*Id.*, p.1169).

The court ruled that Sunseris had abandoned their conversion claim. (*Id.* P.1173.)

On April 8, 2005, the New York Court issued a Judgment against Macro. (Record 61, p.1283). None of the Proctors were named as defendants in the New York litigation. As a result, the New York Judgment was against Macro alone.

D. Sunseris File the Present Action in Michigan State Court.

Sunseris filed their initial Complaint in Michigan state court on May 12, 2005, and the Proctors removed to the District Court. Sunseris filed their First Amended Complaint in the District Court on June 2, 2006. (Record 19, p.99).

E. Sunseris Admit Their Claims Accrued in 1996.

The present action is only one of several Sunseris have filed against Macro's alleged partners, all seeking

to collect on the New York Judgment. One such case was filed against Bruce Jones in Alabama state court. On February 17, 2006, Sunseris filed a motion for summary judgment in that court, asking it to rule, as a matter of law, that Bruce Jones was personally liable for the New York Judgment. In their motion, Sunseris admitted that all the claims made in New York Litigation had accrued prior to January 1, 1997. (Record 59, p.1186-187).

II. Procedural Background.

On May 2, 2007, the District Court filed its Opinion and Order, granting the Proctors' Motion for Summary Judgment. Petitioners' Application p. 3a ("Pet. App. 3a"). The District Court held:

> Where, as here, a plaintiff obtains a judgment against the partnership as an entity, but fails to obtain a binding judgment against a partner's individual assets, and consequently cannot enforce that judgment against the partner, the plaintiff must sue the partner based on the underlying misconduct. While the plaintiff may use collateral estoppel to prevent the partner from relitigating the issue of liability, the plaintiff must still bring suit within the applicable limitations period for the underlying wrong.
>
> * * *
>
> Bases on the foregoing discussion, the Court concludes that Plaintiffs' claims against Defendants accrued when their claims against the partnership accrued and not when

> Plaintiffs' obtained a judgment against the partnership.

Pet. App. 8a-9a; 11a.

On August 18, 2008, the Sixth Circuit affirmed, adopting the reasoning of the District Court. Pet. App. 1a.[3]

REASONS FOR DENYING THE PETITION

I. There are no compelling reasons for granting the Petition.

United States Supreme Court Rule 10 provides that review is a matter of judicial discretion and will only be granted for "compelling reasons." For the purposes of considering this Petition, those compelling reasons include a decision that conflicts with the decision of another Circuit Court or a decision of this Court. Sup.Ct.R. 10(a). In addition, "A petition for a writ of certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law." *Id.* As this Court has noted:

> It is our practice to accept a reasonable construction of state law by the Court of Appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion". *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078, 48

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[3] The Sixth Circuit adopted the reasoning of the District Court. Pet. App. 2a. As a result, all future references in this Brief will be to the District Court and its Opinion. Pet. App. 3a.

> L.Ed.2d 684 (1986)... "We emphasize...that, standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 314 n.8 (1983).

In this case, as is discussed below, there is no direct conflict with a decision of this Court. Furthermore, not only is the District Court's decision not in conflict with the decision of another Circuit Court, the District Court adopted the reasoning of the Ninth Circuit in *Valley National Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332 (9th Cir. 1997). Pet. App. 8a.

The District Court's jurisdiction in this case was based on diversity of citizenship and was therefore governed by state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The District Court was required to decide what the Michigan Supreme Court would have done in the absence of binding precedent. That is exactly what the court did. The District Court also discussed and distinguished the state court cases (none from Michigan) and the lone bankruptcy case cited by Sunseris below and in their Petition. Pet.App. 9a-11a. The remainder of Sunseris' argument is an extended discussion of why the Ninth Circuit's decision in *Valley National Bank* was wrongly decided and why the Sixth Circuit incorrectly applied state law. These arguments do not satisfy the stringent requirements of Rule 10.

II. Review is not warranted because the Sixth Circuit's ruling is consistent with this Court's decision in the *United States v. Galletti*.

Sunseris' primary argument for seeking this Court's review is their contention that the District Court's decision conflicts with *United States v. Galletti*, 541 U.S. 114, 124 S.Ct. 1548, 158 L.Ed.2d 279 (2004). The District Court discussed *Galletti* at length, and concluded that *Galletti* "says nothing about whether the statute of limitations bars a subsequent claim against partners who are not bound by a judgment against a partnership." Pet.App.11a. The District Court was correct: *Galletti* says nothing about statutes of limitation in the context presently before this Court. The *Galletti* decision does, however, support the Proctors' position by analogy.

In *Galletti*, the IRS assessed unpaid employment taxes against a general partnership. According to the Internal Revenue Code, assessments must occur within three years after the return is filed or collection is barred. *Id.* at 116. If, however, a tax is properly assessed within three years, the statute of limitations for collection of the tax is extended by ten years from the date of assessment. The IRS timely assessed the general partnership for unpaid federal employment tax liabilities in 1994, 1995 and 1996, which the partnership never paid. *Id.* at 117. One group of partners filed for Chapter 13 bankruptcy protection in 1999, and another filed in 2000. *Id.* The IRS then filed claims for the unpaid taxes in the bankruptcy proceedings of the general partners. The partners argued that because they were only secondary liable for the tax debt, the Government was required to assess them separately in order to extend the statute

of limitations from three years to ten years. *Id.* at 121-122. This Court disagreed, holding that the tax code contained no such requirement. *Id.* at 122.

This Court also relied on its earlier decision in the *United States v. Updike*, 281 U.S. 489, 50 S.Ct. 367, 74 L.Ed. 984 (1930), which interpreted a predecessor to the statute at issue in *Galletti*. In *Updike*, the Updike Grain Company filed its 1917 tax returns and paid all taxes then owing. The company subsequently lawfully dissolved and its assets, after payment of all debts, were distributed to its shareholders. Shortly thereafter, the Revenue Act of 1917 was enacted, which required corporations that had dissolved prior to the passage of the Act to file tax returns. The company failed to do so. *Id.* at 490-91. A year later, a Revenue Agent examined the books of the corporation, filed an additional return on its behalf, and assessed additional taxes. A lawsuit to recover the unpaid taxes was brought against the stockholders of the corporation more than seven years after the assessment. (At that time, the statute of limitations required that suits to collect unpaid taxes be initiated within six years after timely assessment.) *Id.* at 491-92.

This Court held that the suit against the shareholders was barred because if "the period of limitation had run in favor of the corporation, it had run in favor of the transferees." *Id.* at 494. As this Court noted, "to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the Act to promote repose by fixing a definite period after assessment within which suits in proceedings for the collection of taxes must be

brought." *Id.* at 495-496. Turning back to *Galletti*, this Court summarized its holding in *Updike* as follows:

> The basis of the liability in *Updike* was a tax imposed on the corporation, and the Court held that the same limitations period applied in the suit to collect the tax from the corporation as in a suit to collect the tax from the derivatively liable transferee.

Id. at 123.

A cogent analysis of this Court's decision in *Updike* (and by extension *Galletti*) may be found in *U.S. v. Wright*, 57 F.3d 561 (CA. 7, 1995). In that case, a partnership, Empire Wood Company, entered bankruptcy in 1982. A plan of reorganization confirmed in 1984 promised payment of back taxes. The company collapsed in 1985 without paying its taxes. The United States filed suit in 1993 seeking to collect the partnership's 1982 taxes from some of the general partners. *Id.* at 562. In dismissing the case, the Seventh Circuit engaged in the following analysis:

> When multiple persons owe taxes on account of the same events, does the statute of limitations govern the debt as a whole, or does it apply separately to each obligor's circumstances? *Updike* tells us that the governing principle is all-for-one, one-for-all. After a corporation dissolved and distributed its assets to investors, a change in the Internal Revenue Code increased the firm's obligations. The Court first held that the transferees owed the dissolved firm's taxes and were not "trustees" for the United States. Next it tackled the

> Commissioner's argument that the statutes of limitation—which concededly had expired for a suit against the corporation itself—did not start to run against the investors until the IRS demanded that they make good the firm's obligations. The Court's response was curt: "If by [statute] the period of limitations had run in favor of the corporation, it had run in favor of the transferees."

Id. at 563.

Galletti, *Updike*, and *Wright* all hold that the statute of limitations to collect unpaid taxes begins to run at the same time for both the principal taxpayer and for those who are derivitably liable. By analogy to the present case, Sunseris' claims against the Proctors, who Sunseris argue are secondarily liable, accrued at the same time as Sunseris' causes of action against the partnership itself, and not when Sunseris obtained a judgment against the partnership.[4]

The Sunseris are correct that a timely assessment of taxes against a taxpayer extends the statute of limitations for collecting that tax to ten years, for both the taxpayer and those who may be secondarily liable. Assessment of the tax against the taxpayer does not, however, toll the statute of limitations against secondarily liable individuals indefinitely. Actions to collect those taxes from secondarily liable individuals

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[4] The District Court held that Sunseris' claims against the Proctors accrued no later than 1996 and were therefore time barred. See Pet. App. 11a-13a. Sunseris have not disputed this holding.

must still be brought within the period of limitation. See for example, *U.S. v. Diamond*, 142 F. Supp. 441, 443 (S.D.N.Y. 1956):

> Where, as here, an assessment has been made against the transferor, an action to impress a trust upon property in the hands of the transferee must be begun within six years of the assessment. United States v. Updike, 281 U.S. 489, 50 S.Ct. 367, 74 L.Ed. 984, supra. This action was not brought within that period and is thus barred insofar as it seeks to impress a trust.

See also, *U.S. v. Monroe*, 65 F. Supp. 213, 216 (W.D. Pa. 1946): "The period of limitations applicable to an action against the transferee is six years from the date of the assessment against the taxpayer."

Applying the foregoing cases to the matter at hand, the District Court correctly held that "Plaintiffs' claims against Defendants accrued when their claims against the partnership accrued and not when Plaintiffs' obtained a judgment against the partnership." Pet. App. 11a. As a result, Sunseris' claims are time barred.

III. The District Court's Decision Furthers the Policy Interests Reflected in Statutes of Limitations.

In its Opinion, the District Court correctly found that *Valley National Bank*, supra, was consistent with the policy interests reflected in statutes of limitations. (Pet. App. 8a) Statutes of limitations "are not simply technicalities [, but rather are] fundamental to a

well-ordered judicial system, and therefore, must be strictly construed." *English v. Bousamara*, 9 F. Supp. 2d 803, 807 (W.D. Mich. 1998) (internal citations omitted).

The policy goals underlying statutes of limitation are well established:[5]

> [Statutes of limitation] encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they "afford security against stale demands when the circumstances would be unfavorable to a just examination and decision"; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they "'remedy . . . the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.'"
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> "In summary, the primary purposes behind statutes of limitations are: 1) to encourage plaintiffs to pursue claims diligently, and 2) to protect defendants from having to defend against stale and fraudulent claims."

Lemmerman v. Fealk, 534 N.W.2d 695, 698 (1995).

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[5] The District Court held that because the Proctors' motion was based on the statute of limitations, it must look to Michigan's statutes of limitations, regardless of which state's partnership laws might apply. Pet. App.11a.

Statutes of limitation prevent a plaintiff from sitting on his or her rights: "[s]tatutes of limitation are designed, in part, to protect potential defendants from the protracted fear of litigation, and to promote repose, security and stability by bringing finality to disputes." 51 Am.Jur.2d Limitation of Actions §16 (citing, in part, *Frankenmuth Mut. Ins. Co. v. Marlette Homes*, 573 N.W.2d 611 (1998)).

The courts also benefit from statutes of limitation. 51 Am.Jur.2d Limitation of Actions §17 ("Statutes of limitation are intended, in part, to avoid burdening courts with stale claims and promote judicial economy" (citations omitted).

Finally, statues of limitation implicate public policy concerns, as well as those of the parties to the litigation and the courts:

> [s]tatutes of limitation rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses. *Id.*

The facts underlying this case originally rose as far back as 1988. Sunseris filed the New York Litigation in 1996. For reasons unknown, that litigation took almost 10 years to reach a verdict. For all of those 10 years, the Proctors were forced to live without knowing whether they would have to defend themselves in a suit brought against them. There is simply no question that memories have faded, and witnesses

have been lost. For example, Fran Hannon, Macro's managing partner, died not long after the New York trial concluded.

Sunseris' position that the Proctors should be subject to trial for events occurring 20 years ago, when there is no question that Sunseris could have sued the Proctors as early as 1996, clearly runs counter to the purposes behind statutes of limitation. It would subject the Proctors in particular and litigants in general to protracted fear of litigation, failing memories, insecurity and instability. It would also clearly burden courts with stale claims.

IV. The District Court's Decision is Consistent with the Entity Theory of Partnership Law.

Sunseris argue that the District Court's decision is inconsistent with the entity theory of partnership law. The District Court specifically considered and rejected this argument in its Opinion. Pet. App. 8a-9a.

In their analysis of partnership law, Sunseris appear to argue that a partnership creditor cannot file suit against an individual partner until the creditor has first obtained a judgment against the partnership and has had its execution returned unsatisfied. This argument is simply wrong.

As Plaintiffs correctly note, the Revised Uniform Partnership Act ("RUPA") has been adopted by many states, including Florida (where Macro was eventually located) and Arizona (the source of law for *Valley National Bank*). Section 307(D) of RUPA restricts a partnership creditor's ability to execute on the assets

of a partner until after the creditor has first obtained a judgment against the partnership and execution of that judgment has gone unsatisfied. RUPA does not, however, prevent a partnership creditor from obtaining a judgment against the partner before attempting to execute on partnership assets.

For example, Florida law provides:

620.8307. Actions by and against partnership and partners

(1) A partnership may sue and be sued in the name of the partnership.

(2) An action may be brought against the partnership and, to the extent not inconsistent with s. 620.8306, any or all of the partners in the same action or in separate actions. (Emphasis added)

(3) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

(4) A judgment creditor of a partner may perfect a judgment lien but may not proceed against or otherwise levy or execute against the assets of the partner to satisfy the judgment arising from a partnership obligation or liability unless the partner is personally liable for the claim under s. 620.8306 and:

> (a) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part.[6]

Thus, under subsection 2, a partnership creditor may sue both the partnership and any or all of the partners in the same or separate actions. Subsection 3 makes it clear that a partnership creditor must have a judgment against a partner before the creditor may look to the partners' assets to satisfy that judgment. Subsection 4 teaches that once a creditor has a judgment against a partner, which it may obtain in the same action as the action against the partnership (see subsection 2), the creditor must first execute against the partnership and have that execution returned unsatisfied before the creditor may execute against the partners' assets.

Thus, under RUPA, a plaintiff is free to sue a partner simultaneously with the partnership or in a separate action. RUPA does not, however, provide guidance with regard to <u>when</u> a separate action against a partner accrues. That issue is left to state law, which the District Court used in reaching its decision.

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[6] A similar provision is found in Arizona (A.R.S. §29-1027), where *Valley National Bank* was decided.

V. The Sixth Circuit Opinion Does Not Deprive the New York Judgment of the Effect it would have had in New York.

Sunseris argue that the District Court's Opinion somehow deprives the New York Judgment of the effect it would have had in New York. The District Court specifically considered and rejected this argument in its Order Denying Plaintiff's Motion for Reconsideration: "The Court's finding that the statute of limitations bars Plaintiffs' claims says nothing about the validity or preclusive effect of the New York judgment." Respondent's App. 3b. The District Court was correct.

First, because the Court's jurisdiction was based on diversity of citizenship, it was governed by state law. Pet.App. 11a; *Erie R. Co. v Tompkins*, 304 U.S. 64 (1938). Second, because the Proctors' motion for summary judgment was based on the statute of limitations, Michigan's statutes of limitations governed, regardless of which state's partnership law might otherwise have applied. Pet.App.11a; *Erickson v Am. Motors Corp.*, 683 F. Supp. 644, 645-46 (E.D. Mich. 1987). Thus, applying Michigan law as interpreted by the District Court, Sunseris' claims were untimely in Michigan. Had Sunseris' brought their claims in New York (assuming that the court there would have jurisdiction over the Proctors), when those claims accrued, and whether they were timely, would have been governed by New York law. But because they were not, New York law is simply irrelevant. The District Court determined what effect the New York judgment would have in Michigan. That decision had no effect on what might or might not occur in New York.

Sunseris assert that a subsequent suit against a partner who was not named in the original suit is limited to the issue of whether or not the defendant is, in fact, a general partner in the partnership. They also argue that collateral estoppel would prevent the defendant partner from relitigating the underlying misconduct that resulted in the judgment against the partnership. See Petition at pp. 27-28. This is precisely the ruling that the District Court made in an earlier opinion. Pet.App. 17a. The Proctors did not appeal that ruling.

Sunseris also cite *Whitley v. Klauber*, 69 AD.2d 99; 417 N.Y.S.2d 959 (1979). In *Whitley*, a judgment creditor of a limited partnership sought, in a subsequent action, a judgment against the limited partners to the extent of their partnership contributions, which the limited partnership had returned to them. The court rejected the defendant's statute of limitations argument because, according to the court, "In order for plaintiff to proceed against the limited partners, it would be necessary for him to establish the unavailability of partnership assets to satisfy his claim." *Id.* at 108. In its decision, the District Court specifically considered and distinguished *Whitley*, noting that the Sunseris were not required to first demonstrate that the partnership's assets had been exhausted before they could proceed against the Proctors. They could have immediately sued the Proctors. Pet.App. 9a.

At bottom, Sunseris believe the District Court erred because it misapplied Michigan state law. However, "a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject

of this Court's review." *Haring v Prosise*, 462 U.S. 314 n. 8 (1983).

CONCLUSION

Petitioners have not demonstrated any compelling reasons for this Court to grant their petition for a writ of certiorari. The essence of Petitioners' challenge to the Sixth Circuit's ruling is that the court misapplied Michigan state law. This does not represent a sufficient basis for review under Supreme Court Rule 10. In addition, the lower court's opinion does not conflict with decisions by this Court or decisions of other circuits. Finally, the lower court's opinion comports with the policy implications supporting statutes of limitations.

For these reasons, Respondents request that this Court deny Petitioners' request for review.

DATED this 15th day of December, 2008.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

CASE NO. 05-73108

[Filed June 7, 2007]

JACK SUNSERI and CONSOLIDATED PARTNERS, LTD.,

Plaintiffs,

v.

PHYLLIS PROCTOR, CONRAD PROCTOR, DAVID PROCTOR, PHYLLIS D. PROCTOR TRUST, ANDERSON-PROCTOR LIMITED PARTNERSHIP, PROCTOR, L.L.C., and ANDERSON-PROCTOR, L.L.C.,

Defendants.

HON. LAWRENCE P. ZATKOFF

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter is before the Court upon Plaintiffs' Motion for Reconsideration (Docket # 69) of the Court's May 2, 2007, Opinion and Order Granting Defendants' Motion for Summary Judgment. Plaintiffs filed the current motion pursuant to E.D. MICH. LR 7.1(g) on May 21, 2007.

According to E.D. MICH. LR 7.1(g)(1), "[a] motion for ... reconsideration must be filed within 10 days after entry of the judgment or order." Additionally, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." FED. R. CIV. P. 6(a). Finally, FED. R. CIV. P. 6(e) does not apply to motions brought to amend or alter a judgment. *See FHC Equities, L.L.C., v. MBL Life Assur. Corp.*, 188 F.3d 678, 681-82 (6th Cir. 1999) (citing cases and holding that Rule 6(e)'s extension does not apply to time periods that begin with the entry of a judgment or order rather than with service by mail or other means).

The order for which reconsideration is sought was entered on May 2, 2007. Therefore, excluding Saturdays, Sundays and legal holidays, Plaintiffs' motion was due on May 16, 2007. Consequently, Plaintiffs' Motion for Reconsideration is untimely and is DENIED.

Notwithstanding its untimeliness, the Court finds that Plaintiffs' motion is without merit. First, the Court is unpersuaded that Macro's withholding of information from Plaintiffs alters the Court's analysis. Plaintiffs, as partners, had adequate remedies available to obtain the financial and other partnership information they sought. Second, the Court's

recognition of the policies underlying statutes of limitations was merely illustrative of the consistency between the Court's conclusion regarding when Plaintiffs' claims accrued and the purposes behind statutes of limitations; it did not purport to weigh the policy considerations for or against either party.

Third, the Court rejects Plaintiffs' argument that the Court's decision is inconsistent with the concept of joint and several liability and the provisions in various partnership acts providing for successive suits to satisfy a judgment against a partnership. Plaintiffs rely on partnership statutes providing that a plaintiff may enforce a judgment against the partnership against an individual partner's personal assets, and that the time limit for such enforcement begins to run when the judgment against the partnership is attained. These partnership acts provide a mechanism for partnership creditors to sue the partnership as an entity without having to name each partner in order to maintain the suit. Contrary to Plaintiffs' assertion, these provisions do not require plaintiffs to obtain a judgment against a partnership as a entity prior to collecting against an individual partner's personal assets. Further, these acts are silent as to when the statute of limitations begins to run against partners who were neither named nor served in the original action.

Finally, the Court disagrees with Plaintiffs' assertion that the Court's conclusion deprives the New York judgment of the effect it would have had in New York. The Court's finding that the statute of limitations bars Plaintiffs' claims says nothing about the validity or preclusive effect of the New York Judgment.

IT IS SO ORDERED.

s/ Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: June 7, 2007